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The Mentally Ill Attorney

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TABLE OF CONTENTS

I.	INTRODUCTION	157
II.	THE CLIENT	161
	A. <i>Client Responsibilities to the Attorney and the Court</i>	162
	B. <i>Potential Harms Caused by the Attorney's Mental Illness</i> ..	164
	C. <i>Protecting Oneself as the Client</i>	166
III.	THE ATTORNEY	168
	A. <i>The Attorney's Responsibility</i>	168
	1. Voluntary Removal	170
	2. Inactive Bar Status	172
	B. <i>Adjudication of Insanity or Mental Illness</i>	173
	C. <i>Mitigation</i>	174
	1. Alcoholism	175
	2. Drug Dependence	176
	3. Anxiety and Dissociative Disorders	177
	4. Psychosis	178
	5. Other Disorders	179
	6. The Effect of the ADA in Attorney Misconduct Proceedings	180
IV.	THE ATTORNEY'S FIRM	181
	A. <i>The Attorney's Duty to Mitigate</i>	183
	B. <i>Duty to Report Another Attorney's Misconduct</i>	184
	C. <i>Risks of Reporting</i>	187
V.	CONCLUSION	188

I. INTRODUCTION

ABC Excavating is a small construction firm specializing in site preparation work.¹ The company has been successful for a number of years on a small scale, providing a comfortable existence for the company's

1. Although the names of the parties are fictional, in all other respects this is a true story. This case is ongoing. Disbarment proceedings may be public record, but revelation of them would jeopardize client confidentiality in the present action against the attorney and his partners.

shareholders, Jack Brown and his wife. Early in 1999, the firm orally contracted to perform some work in a South Florida county. As is sometimes the case, the property owner paid the general contractor, and the general contractor did not pay ABC Excavating. ABC Excavating filed a lien against the property and, failing any response from either the owner or the general contractor, ABC Excavating sought to foreclose. With that in mind, the owners of ABC Excavating turned over all of their meager paperwork to their attorney, Mike Pfenning of Rodriguez, Marko & Pfenning, P.A. A year went by, and the statute of limitations for lien foreclosure expired. Another year went by, and the statute of limitations for suing on an oral contract expired. During this period, ABC Excavating was regularly assured by Pfenning that he was filing pleadings and that everything was going well.

However, nothing was going well. As Pfenning later said in his letter to the Florida Bar, he was afflicted with a mental disorder that made him put all of his work into various desk drawers and then forget about it.² Pfenning would spend the remainder of his days staring out of the windows of his office, or would simply not show up for work. His partners were aware of his behavior but were reluctant to intervene. They were even more reluctant to inform his clients. Pfenning's partners let their malpractice insurance lapse. Ultimately, they dissolved the partnership. Since then, Pfenning has been disbarred. All three partners have liquidated their assets or moved them into the names of others. Two of the three partners have filed for bankruptcy and the third is not far behind. ABC Excavating is now seeking to recover from the attorneys personally, but the bankruptcy actions have all but eliminated their chances for recovery.

Although the incidence of mental illness and drug abuse among attorneys is far from negligible, stories this egregious are, fortunately, not played out every day. Several questions raised by this case include the following:

- What could the Browns have done to mitigate the damage caused by their attorney?
- What could the attorney have done to mitigate or prevent the damage his illness has caused?
- What were the responsibilities of the partners to the clients, to the mentally ill partner, and to the Florida Bar?

2. Incredibly, the original complaint to the bar was filed by a client of Pfenning's for whom he was prosecuting a malpractice suit against another attorney for neglecting a client's case.

The purpose of this article is to look at the factors involved in these questions and to attempt to frame answers that may be useful to both clients and attorneys in looking at the effect mental illness can have on the attorney-client relationship and on the parties thereto.

Mental illness is a subset of a broad range of conditions of unfitness, which could preclude an attorney from practicing law.³ It may, in and of itself, render an attorney unfit for practice, or it may be the catalyst for other conduct that violates the rules of professional responsibility.

The overriding issue regarding the conduct precipitated by an attorney's illness lies in the public policy concern that attorneys act in the public interest; the public is entitled to a presumption that an attorney licensed to practice is fit to do so.⁴ Failure of this presumption is a failure of the public's trust,⁵ and the consequences of such a failure may be far-reaching.

Given that the public policy concern revolves around the attorney's inability to carry out his or her professional duties, a mental illness that does not prevent an attorney from effective practice is not at issue here. The fact that it does not noticeably affect a lawyer's performance makes the incidence of such illness difficult to track. Such "non-actionable" mental illnesses

3. FLA. RULES OF PROF'L CONDUCT R. 4-8.4 cmt. (1988).

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Id.

4. Gregory G. Sarno, Annotation, *Mental or Emotional Disturbance as Defense to or Mitigation of Charges Against Attorney in Disciplinary Proceeding*, 26 A.L.R. 4th 995, 1006-07 (1983).

[I]n disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi-offense, consideration of the interest and safety of the public os [sic] of the utmost importance . . . [it would be wrong] to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable legal profession when he, by his misconduct, has exhibited a lack of integrity and common honesty. And it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong . . . the public has a right to protection against his activities in the practice of law.

Id.

5. *Id.*

would include many of the disorders formerly labeled as neuroses by the American Psychiatric Association.⁶

Mental illness is more difficult to detect in others—and in oneself—than a physical illness such as hepatitis or tuberculosis.⁷ To the casual lay observer, as most of us are, a mental illness will generally manifest itself through conduct outside of the generally accepted norm; it will become cause for concern or investigation when it violates the *Rules of Professional Conduct*.⁸

Attorneys are not subject to disciplinary action for being mentally ill, only for conduct which violates the rules.⁹ On the other hand, violations of the rules are not evidence of mental illness, and those attorneys who plead such illness as the cause of their violations must show that it directly caused the misconduct.¹⁰ When a showing of causation is made, disciplinary action

6. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 9–10 (3d ed. 1980). In 1980, the American Psychiatric Association omitted the former major class of disorders called “neuroses” from its diagnostic manual and replaced it with several categories such as “affective, anxiety, somatoform” and so on. *Id.* The rationale for this change was the absence of a general consensus on the definition of neuroses. *Id.* For the purposes of this article, the old adage that neurotics build castles in the sky and psychotics actually live in them will provide an adequate, if folkloric, distinction.

7. Hepatitis C “[s]ymptoms may include fever, fatigue, abdominal pain, jaundice, and elevated liver enzymes.” HCV Advocate Glossary, at <http://www.hepatitis-c-advocate.org/hepatitis-c-symptoms.htm> (last visited Sept. 12, 2002). Tuberculosis consists of constant coughing fits along with spitting up blood; common symptoms of this illness include fever, inflammation, headache, soreness of throat, palate, breast and lungs. (Tuberculosis, at <http://www.aidsmeds.com/OIs/TB2.htm> (last visited Sept. 12, 2002)). On the other hand, the Canadian Mental Health Association states that the symptoms of depression include feelings of worthlessness, helplessness or hopelessness, difficulty with concentration or decisions, avoidance of other people, overwhelming feelings of sadness, and thoughts of death or suicide, which are also among the symptoms of manic depression. Depression & Manic Depression Symptom Questionnaire, at http://www.truehope.com/non_online_forms/forms3.htm (last visited Sept. 12, 2002).

8. *Id.*

9. However, evidence of mental illness may be a bar to admission. Since the introduction of the Americans with Disabilities Act in 1990, 42 U.S.C. §§ 12101–12213, the profession’s methods of regulating attorney fitness where mental health is an issue have come under attack as violative of the ADA. This is particularly true with regard to mental health questions posed on bar applications. See, e.g., Erica Moeser, *Yes: The Public Has the Right to Know About Instability*, A.B.A.J., Oct. 1994, at 36; Kathi Pugh, *No: Mental Health Treatment Should Not Block a Career*, A.B.A.J., Oct. 1994, at 37.

10. In order for an attorney’s alleged illness to be taken into account as a mitigating circumstance in a disciplinary proceeding, the attorney must “establish any causal link between his health problems and his pattern of serious professional misconduct.” *In re Stein*,

will ensue, and the illness will often be treated as a mitigating factor in the imposition of sanctions.¹¹ Sanctions will range from disbarment¹² to censure,¹³ but will often include suspension pending effective treatment for the attorney's disorder.¹⁴

There are certain primary participants in the attorney-client relationship: the client, the attorney, and, under the imputed knowledge doctrine of the *Model Rules of Professional Conduct*, the attorney's firm.¹⁵ The remainder of this article will review the various ways the attorney's mental illness affects these participants and what, if anything, may be done to mitigate the effects of the illness on the attorney's work.

II. THE CLIENT

What risks do clients run if they are among those whose cases are affected by the mental or emotional instability of their attorney? They run many of the same risks that the Browns encountered in their relationship with Mr. Pfenning of the earlier example. The possible permutations of attorney misconduct are numerous, running the gamut from loss of the action due to statute of limitations problems, to simple cases of inadequate settlement due to attorney carelessness.¹⁶

Before continuing, it is worth noting that the risk of a client being an actual victim of an attorney's mental or emotional instability is extremely low. Although some fifteen-percent of Florida's attorneys will suffer from career-affecting mental illness or addiction at some point in their lives,¹⁷ the number of cases these attorneys will negatively affect will probably be small.

596 N.Y.S.2d 8, 9 (App. Div. 1993) (quoting *In re Kurtz*, 580 N.Y.S.2d 1 (App. Div. 1992)); see also 7 N.Y. JUR. 2d *Attorneys at Law* § 405 (1997).

11. See Fla. Bar v. Musleh, 453 So. 2d 794, 797 (Fla. 1984); Fla. Bar v. Budish, 421 So. 2d 501, 503 (Fla. 1982); Fla. Bar v. Larkin, 420 So. 2d 1080, 1081 (Fla. 1982).

12. Fla. Bar v. Horowitz, 697 So. 2d 78, 83 (Fla. 1997) (holding that an attorney may be disbarred for neglect of clients and for failure to respond to communications from the Bar despite attorney's clinical depression).

13. Fla. Bar v. Price, 348 So. 2d 887, 890 (Fla. 1977) (punishing the attorney with a public reprimand and thirty-day suspension).

14. Fla. Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992) (suspension for thirty days and eighteen-month probation); Fla. Bar v. Carbonaro, 464 So. 2d 549, 551 (Fla. 1985) (three-year suspension continuing until rehabilitation proved).

15. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2002); see also *Sears, Roebuck & Co. v. Stansbury*, 374 So. 2d 1051 (Fla. 5th Dist. Ct. App. 1979).

16. See *infra* Part III.

17. See *infra* Part III.

To try to establish some order of magnitude, assume that an attorney practices thirty years, handles 250 matters per year (a number that may vary greatly depending on the branch of the law in which one practices), and that each mentally or emotionally unstable attorney ruins five cases. There are some 70,000 attorneys in Florida.¹⁸ Using the figures just mentioned, the mentally or emotionally unstable attorneys will cause problems with some 52,000 matters. Fifty-two thousand matters may sound like the makings of a plague or a scourge, until one considers that during that same period of time, some 700,000,000 matters will be handled normally.¹⁹ In other words, the chances of one's case being among those negatively affected by the mental state of the attorney could well be less than one in thirteen thousand.²⁰

A. *Client Responsibilities to the Attorney and the Court*

Although the client is the *raison d'être* of the attorney's representation, there is very little in the *Rules of Professional Conduct* governing responsibilities of the client for his or her case. By their very nature, the rules cannot directly address client conduct, and what rules there are concern only an attorney's responses to the implied duties of the client. These implied duties include a client's candor to the attorney²¹ and to the tribunal,²² a client's obligation to pay for services,²³ and a client's obligation to assist in determining the scope of the representation.²⁴

Despite its strong fiduciary overtones,²⁵ the relationship between an attorney and a client is nevertheless essentially a contractual relationship,²⁶

18. Fla. Bar Organization, available at <http://www.flabar.org> (listing approximately 70,000 attorneys as members of the Florida Bar) (last visited Sept. 7, 2002); see Richard B. Marx, *Impaired Attorneys and the Disciplinary System*, 11 FLA. B.J. 14 (Dec. 1999).

19. This hypothetical assumes a forty-year-long career for each of Florida's 70,000 attorneys and 250 cases per attorney per year.

20. In the year ending August 1, 2001, the Florida Bar spent \$7,915,314 of the \$12,859,897 it collected in dues on disciplinary matters. In the same time period, there were 38 disbarments, 155 suspensions and 57 public reprimands. The number of bar complaints filed was 9280 for the period, or one complaint for, approximately, every seven attorneys. The Florida Bar, updated August 1, 2001, as reported in Christopher C. Copeland, *Disciplinary Proceedings, Practical Legal Issues in Florida: Issues and Answers*, National Business Institute, Inc., 2001.

21. See generally, MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).

22. MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2002).

23. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5) (2002).

24. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

25. THE FLA. BAR, FLORIDA CIVIL PRACTICE BEFORE TRIAL § 1.38 (6th ed. 2000) [hereinafter FLA. CIVIL PRACTICE BEFORE TRIAL]; see also, *Gerlach v. Donnelly*, 98 So. 2d

and both sides of the relationship have duties and obligations. The obligations of clients, other than for payment and the implied duties mentioned above, revolve primarily around selecting an attorney with whom they are comfortable.²⁷ The word “vibe” is regularly used when selecting an attorney.²⁸ A general feeling of competence and caring (and reasonableness of fees) is desirable, as well as a sense that honest communication will flow in both directions.²⁹ Often, novice or distraught clients will look to the lawyer as much more than merely legal counsel and will transfer to counsel “dependencies for guides to conduct in strange circumstance, for nonlegal advice, and often for approval.”³⁰ A lawyer is not one’s minister, psychic advisor or friend. A lawyer is no more than an advisor or advocate in legal matters.³¹

493, 498 (Fla. 1957) (“[N]o relationship between individuals . . . involves a greater degree of trust and confidence than that of attorney and client.”); *In re Clifton*, 155 So. 324, 326 (Fla. 1934) (“The relation of attorney and client is that of master and servant in a limited and dignified sense, and involves the highest personal trust and confidence.”); *Pilkington v. Rose*, 102 So. 751, 752 (Fla. 1925) (Courts will enforce “the utmost good faith and fair dealing on part of the attorney” in dealings with client.); *610 Lincoln Road, Inc. v. Kelner, P.A.*, 289 So. 2d 12, 14 (Fla. 3d Dist. Ct. App. 1974) (“[V]alidity and fairness [of initial agreement between attorney and client establishing relationship] is generally measured by the ordinary rules applicable to other contracts.” The rule does not establish “that where a controversy arises between an attorney and client the burden is on the attorney to demonstrate that he has taken no undue advantage of the client.”); *Smyrna Developers, Inc. v. Bornstein*, 177 So. 2d 16 (Fla. 2d Dist. Ct. App. 1965).

26. The terms of the contractual relationship are governed by the express terms of the written agreement between the attorney and the client, insofar as they do not violate the Rules Regulating the Florida Bar themselves, the by-laws adopted thereunder, the *Code of Professional Responsibility*, Chapter 454 of the *Florida Statutes*, the Oath of Admission, case law which has developed and elucidated these rules, relevant opinions promulgated by the Professional Ethics Committee of the Florida Bar, and “the attorney is under a duty at all times to represent his client and handle his client’s affairs with the ‘utmost degree of honesty, forthrightness, loyalty and fidelity.’” *Smyrna Developers*, 177 So. 2d at 18; *see also* *Singleton v. Foreman*, 435 F.2d 962, 970 (5th Cir. 1970); *Gerlach*, 98 So. 2d at 498.

27. BERTRAM HARNETT, *LAW, LAWYERS AND LAYMEN: MAKING SENSE OF THE AMERICAN LEGAL SYSTEM* (Harcourt Brace Jovanovich) 187 (1984).

28. *Id.*

29. *Id.* *See also* FLA. CIVIL PRACTICE BEFORE TRIAL, *supra* note 25, § 1.

30. HARNETT, *supra* note 27, at 206.

31. “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT, PREAMBLE 9 (2002); *see also* HARNETT, *supra* note 27, at 206.

B. Potential Harms Caused by the Attorney's Mental Illness

From a client's perspective, an attorney may ruin a client's case in two ways, either through his or her negligence, or through no clearly provable fault of the attorney. In the case of clear attorney negligence, cases may be lost for the following reasons:

- The attorney lets the statute of limitations lapse.³² Failing alternative causes of action, rare in the type of straightforward cases making up the vast majority of legal work, the client's recourse against the hoped-for defendant simply no longer exists.³³
- The attorney fails to file responsive pleadings.³⁴ If the attorney fails to file an answer to an adversary's complaint, the client is faced with a default judgment;³⁵ failure to comply with discovery requests or court orders can similarly lead to default judgments.³⁶ In these cases, recourse against the erstwhile adversaries is extremely difficult and may be barred by *res judicata*.
- The attorney simply fails to prosecute diligently or intelligently.³⁷ The risk of default is heightened if the attorney fails to appear for hearings or is persistently late, if the attorney neglects to prosecute the case, or if he or she forgets straightforward but vital elements

32. FLA. STAT. § 95.011 (2001) (failing to initiate an action within the time limitations defined by the statute is a complete defense, regardless of the cause of the failure.)

A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority, shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

Id.

33. *Id.*

34. FLA. R. CIV. P. 1.110(e). Failure to respond to a complaint is tantamount to a failure to deny. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading." *Id.*

35. FED. R. CIV. P. 55(a) (2000). "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." *Id.*

36. *See, e.g.*, FED. R. CIV. P. 16(e), (b)(2)(C) (2000).

37. MODEL RULES OF PROF'L CONDUCT R. 1.3.

such as service of process, *lis pendens* notices in property disputes, or notices of appearance.³⁸

Although the experienced client might have enough familiarity with the law to understand statutes of limitations and responsive pleadings, and thus know to ask appropriate questions of the attorney, the third scenario is largely beyond the client's ability and control. In cases where attorney negligence is not at all clear, cases may be lost in three ways:

- On the merits;³⁹
- Through actions of the attorney where the client is unaware that these actions constitute malpractice;⁴⁰
- Through actions of the attorney where the client will be unable to show that the actions constitute malpractice.⁴¹

Client recourse against the attorney in these cases is very limited. In the case of a loss on the merits, there would (or should) be no action.⁴² If the client is unaware of the malpractice, then there would be no recourse

38. FLA. R. CIV. P. 1.070(j). Failure to serve a complaint on a defendant within the prescribed 120 days and absent "good cause or excusable neglect" will result in a court order for service within a prescribed time, "dismiss[al] [of] the action without prejudice," or dismissal from the action of the defendant who was not timely served. *Id.* A notice of *lis pendens* preserves to litigants the status of property involved in litigation and "place[s] persons who may have an interest in the property on notice of a claim against . . . [said] property." FLA. CIVIL PRACTICE BEFORE TRIAL, *supra* note 25, § 9-5. See FLA. STAT. § 48.23 (2001).

39. In the absence of malpractice, a loss on the merits is a loss based on the substantive issues of the case. The merits are the elements or grounds of a claim, the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, especially of procedure. BLACK'S LAW DICTIONARY 1003 (7th ed. 1999). A trial on the merits is a trial on the substantive issues of the case, as opposed to motion hearing or interlocutory matter. *Id.* at 1512.

40. If the client is unaware of the *Rules of Professional Conduct* and the Rules of Civil Procedure (see, e.g., discussion *supra* notes 32-38), it follows that the client will be unaware of any violations of these Rules by an attorney.

41. *Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999). "[I]n a claim for legal malpractice, a plaintiff must plead and prove the following elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence was the proximate cause of the client's loss." *Id.* See, e.g., *Companion v. McClin*, 645 So. 2d 1109, 1110 (Fla. 5th Dist. Ct. App. 1994); *Bolves v. Hullinger*, 629 So. 2d 198, 200 (Fla. 5th Dist. Ct. App. 1993); *Freeman v. Rubin*, 318 So. 2d 540, 542 (Fla. 3d Dist. Ct. App. 1975); *Weiner v. Moreno*, 271 So. 2d 217, 219 (Fla. 3d Dist. Ct. App. 1973).

42. If a case is lost on the merits and there has been no malpractice by the attorney, the client would have no grounds for a malpractice claim.

because the client did not know there was a basis for a claim.⁴³ The third scenario requires the client to show that, had the former attorney been sober, diligent, timely or sane, the client would not have lost the case.⁴⁴ Such a suit involves, in essence, retrying the underlying case, while at the same time showing that the former attorney's actions materially affected the outcome.⁴⁵ This is expensive, often lengthy, and almost always unpleasant. Furthermore, chances of success may be low.⁴⁶

C. *Protecting Oneself as the Client*

How can clients protect themselves if they suspect their attorney is emotionally or mentally unstable? The answer to that lies in the comments

43. A basic requirement of recourse is the ability to state a cause of action. FED. R. CIV. P. 12 (b)(6). If, as is postulated in *supra* note 40, the client is unaware of possible malpractice because of a lack of knowledge of procedural fundamentals, it follows that the client lacks the requisite knowledge to formulate a cause of action.

44. *Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999). "In a claim for legal malpractice, the plaintiff must plead and prove following elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence was proximate cause of client's loss." *Id.* See, e.g., *Companion v. McClintock*, 645 So. 2d 1109, 1110 (Fla. 5th Dist. Ct. App. 1994); *Bolles v. Hullinger*, 629 So. 2d 198, 200 (Fla. 5th Dist. Ct. App. 1993); *Freeman v. Rubin*, 318 So. 2d 540, 542 (Fla. 3d Dist. Ct. App. 1975); *Weiner v. Moreno*, 271 So. 2d 217, 219 (Fla. 3d Dist. Ct. App. 1973).

45. Joseph H. Koffler, *Legal Malpractice Damages In A Trial Within A Trial—A Critical Analysis Of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 41 (1989) [hereinafter *Koffler*].

In a legal malpractice action, where a client alleges damage resulting from an attorney's failure to properly prosecute or defend an action, the client may be required to prove that he or she would have been successful in prosecuting or defending the underlying action, if not for the attorney's negligence or other improper conduct. This has resulted in placing the burden upon the client in a legal malpractice action to prove a "case within a case", and as it has been described, participate in a "trial within a trial."

Id.

46. *Id.*

[W]itnesses and records may be difficult to obtain or unavailable and memories may have faded by the time the legal malpractice action is tried. Legal malpractice actions are frequently predicated upon an attorney's failure to commence an underlying action within the time prescribed by the statute of limitations, making difficulties such as these, because of long lapses in time, significant probabilities. Similar problems exist where the plaintiff in the legal malpractice action was the defendant in the underlying action and is required to establish that there was a meritorious defense to the underlying action.

Id. See also *Gautam v. De Luca*, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) (explaining that "it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action").

made by Harnett regarding the selection of the attorney.⁴⁷ Once the “vibe” is gone, the client needs to give very serious consideration to changing attorneys.⁴⁸ No reason need be given.⁴⁹ If the client pulls out of the attorney-client relationship prior to adjudication, the case could possibly be set back on track by a competent new attorney.

If the client has something more specific than the loss of “vibe” or loss of trust, such as instances of attorney conduct that violate the law or the *Model Rules of Professional Conduct*, the attorney should be reported to the appropriate authorities.⁵⁰ The state bar associations are by and large self-policing, but do not have a “police force” of any kind.⁵¹ The very nature of attorney-client privilege prevents the bar from, for example, conducting audits of attorney conduct or attorney effectiveness among randomly selected clients.⁵² Without client complaints regarding an attorney’s failures, the bar will never know.⁵³

47. HARNETT, *supra* note 27, at 187–89.

48. *Id.* at 187. “Trust is a key client attitude. Without it, the relationship is never good and the results are often suspect.” *Id.* at 189.

49. FLA. CIVIL PRACTICE BEFORE TRIAL, *supra* note 25, §1.48. “A client may discharge the attorney at any time, with or without cause, subject to liability for payment of any outstanding attorneys’ fees.” *Id.*

50. MODEL RULES OF PROF’L CONDUCT R. 8.3 (2002) requires that attorneys report such misconduct, but no such requirement exists for clients. *See id.* However, for the reasons stated, this writer would urge clients to do so if the conduct of their attorney caused damage to them or to their case.

51. Commentary by Robert B. McKay, former Dean of New York University Law School, *The Lawyer’s Professional Independence, An Ideal Revisited*, John B. Davidson, Ed., American Bar Association, Tort and Insurance Practice Section, p. 35.

The legal profession has been and remains remarkably free from external control. Somehow we have arrogated for ourselves the right of self-regulation from admission to law school . . . to the practice of law . . . and on to discipline as conducted by lawyers and judges, all of whom are law-trained. It’s a self-contained world. The public can take over if the profession overreaches itself . . . and if the profession does not regulate itself in ways that are satisfactory to the public The obligation is to keep our house in order We must make sure that we [regulate] in behalf of the public trust.

Id.

52. Although attorneys, and not clients, are bound by the *Model Rules of Professional Conduct*, this author believes that any audit of this kind would risk exposing aspects of the attorney-client relationship meant to remain protected by the confidentiality doctrines expressed in MODEL RULES OF PROF’L CONDUCT R. 1.6, Canon 4 (Rev. 1984).

53. *See infra* part III. Egregious conduct toward the court or in court may warrant judicial complaints.

III. THE ATTORNEY

The mentally disordered attorney may be psychotic, neurotic, alcoholic, drug dependent, merely emotionally unstable, or some combination of these. Alcoholism is widespread in this country and is said to be the third most serious public health problem, after cancer and heart disease.⁵⁴ One third of all suicides involve alcohol as a contributory factor.⁵⁵ Although problem drinkers account for about eight percent of the general population,⁵⁶ alcoholism and other addictions will impair approximately fifteen percent of the members of the Florida Bar "at some time during their careers."⁵⁷ This figure does not include impairment due to mental illness that is not manifested through addiction, nor does it include the emotional problems that harm an attorney's ability to practice effectively.⁵⁸

A. The Attorney's Responsibility

An attorney who finds himself or herself sufficiently impaired by any of these factors has several responsibilities. On a personal level, the first responsibility should be to seek help.⁵⁹ Professionally, the first responsibil-

54. Mary-Anne Enoch, M.D., M.R.C.G.P., & David Goldman, M.D., *Problem Drinking and Alcoholism: Diagnosis and Treatment*, at <http://www.aafp.org/afp/20020201/441.html> (Feb. 1, 2002) [hereinafter Enoch and Goldman].

Alcohol misuse is associated with considerable morbidity and mortality (100,000 deaths annually), social and legal problems, acts of violence, and accidents. Alcoholism is among the most common psychiatric disorders in the general population: the lifetime prevalence of alcohol dependence, the severe form of alcoholism, is 8 to 14 percent. The ratio of alcohol dependence to alcohol abuse is approximately two to one.

The incidence of alcoholism is still more common in men, but it has been increasing in women, and the female to male ratio for alcohol dependence has narrowed to one to two. . . . Nearly all alcoholics have a comorbid psychiatric disorder, most commonly anxiety and mood disorders in women and drug abuse and antisocial personality disorders in men.

Id.

55. DAVIDSON AND NEALE, *ABNORMAL PSYCHOLOGY: AN EXPERIMENTAL CLINICAL APPROACH* 297 (3d ed. 1982).

56. Enoch and Goldman, *supra* note 54, at <http://www.aafp.org/afp/20020201/441.html>.

57. Marx, *supra* note 18, at 14.

58. *See id.*

59. This author believes that an attorney has a duty to her or himself, to family, and to colleagues to seek to cure, treat, or at least minimize the potentially debilitating effects of impairment.

ity should be to the attorney's clients,⁶⁰ then to the attorney's employers or partners,⁶¹ and finally, to the bar.⁶² Rule 1.16 (a)(2) of the *Model Rules of Professional Conduct* requires that an attorney terminate the attorney-client relationship if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."⁶³ Failure to do so violates other rules, including the requirement of competence,⁶⁴ candor to the tribunal,⁶⁵ and "truthfulness in statements to others."⁶⁶ By not revealing the impairment, however, the lawyer runs the greater risk of misconduct and of being found out. The problem is thus doubled because, in addition to an illness or addiction to overcome, a misconduct violation may lead to sanctions fatal to the lawyer's career.⁶⁷

This last thought calls attention to an important distinction: an attorney suffering from an addiction or a mental illness is not necessarily unable to practice law effectively.⁶⁸ Neither the courts nor the bar examiners have ever been able to prove that fitness to practice is directly related to an absence of mental illness or addiction.⁶⁹ Many attorneys with emotional problems are effective, sometimes excellent, attorneys; many with no diagnosable mental disorders are disciplined for misconduct.⁷⁰ Unfitness to practice manifests itself primarily through conduct.⁷¹

Cessation or suspension of practice because of mental disorder could be accomplished either voluntarily or involuntarily: the attorney may understand that he or she cannot continue without treatment, or may engage in actionable misconduct.⁷² The private nature of the former necessitates a dearth of research and statistics, but the latter and its consequences have

60. See MODEL RULES OF PROF'L CONDUCT 1.16(a)(2) (Rev. 2002). Inability to effectively represent a client or failure to withdraw from representation when an attorney's mental condition affects his or her capabilities are violations of the Model Rules. *Id.*

61. Failure to inform an employer of an incapacity affecting the ability to practice law may result in liability to the firm. See *infra* part IV.

62. R. Regulating Fla. Bar. 3-7.13. An attorney may seek inactive status during rehabilitation. *Id.*

63. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002).

64. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

65. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002).

66. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002).

67. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002).

68. Phyllis Coleman and Ronald A. Shellow, *Fitness to Practice: A Question of Conduct, not Mental Illness*, May, 1994, Fla. Bar J. 71.

69. *Id.*

70. *Id.*

71. *Id.* at 73.

72. *Id.* at 71.

produced a wealth of cases and articles.⁷³ Attorney disciplinary proceedings are a matter of public record,⁷⁴ and a Florida suspension or disbarment requires an appearance before the Supreme Court of Florida.⁷⁵

1. Voluntary Removal

Attorneys who, despite the nature of their illness or addiction, have the presence of mind and the courage to temporarily remove themselves from the practice of law may voluntarily seek treatment, apply to the bar for placement on inactive status,⁷⁶ or seek hospitalization. Seeking hospitalization carries with it the risk of an involuntary adjudication of incompetence.⁷⁷ Attorneys who voluntarily seek treatment are luckier today than they were just ten years ago. Several counseling organizations exist to assist drug or alcohol dependent professionals,⁷⁸ and the stigma of mental illness, while still strong, is much less than it once was.⁷⁹ Dramatic improvements in medications over the last decade permit many psychological problems to be treated on an outpatient basis.⁸⁰ More serious problems may often be taken care of on an outpatient basis after an initial inpatient observation and treatment.⁸¹ The same is true for

73. See generally Fla. Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997); Fla. Bar v. Clement, 662 So. 2d 690 (Fla. 1995); Fla. Bar v. Grigsby, 641 So. 2d 1341 (Fla. 1994); Fla. Bar v. Condon, 632 So. 2d 70 (Fla. 1994); Fla. Bar v. Marcus, 616 So. 2d 975 (Fla. 1993); Fla. Bar v. Poplack, 599 So. 2d 116 (Fla. 1992). See, e.g., 7 AM. JUR. 2D *Attorneys at Law* §71 (1997); Sarno, *supra* note 4, at 995.

74. Not only are the proceedings before the Supreme Court available through the Court Reporter and legal databases, but many of the sanctions imposed have a public aspect to them. For example, among the requirements of a suspension is that attorneys send a copy of the suspension to each of their clients. Marx, *supra* note 18, at 16.

75. "Article V, section 15 [of the Florida Constitution] provides that '[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.'" State v. Palmer, 791 So. 2d 1181, 1183 (Fla. 1st Dist. Ct. App. 2001).

76. R. Regulating Fla. Bar 3-7.13.

77. *Id.* "A lawyer who has been adjudicated insane or mentally incompetent . . . under the Florida Mental Health Act shall be [placed on an inactive list] and shall refrain from the practice of law." *Id.*

78. In addition to the various "Anonymous" groups such as Alcoholics Anonymous, Florida Lawyers Assistance (FLA) provides rehabilitation assistance. It is the organization to which the Supreme Court of Florida sends attorneys if rehabilitation is a condition of their probation. Marx, *supra* note 18, at 16.

79. "Fortunately, for almost 20 years the Florida Supreme Court has . . . looked favorably on a lawyer's efforts at rehabilitation." *Id.*

80. See text *infra* note 146.

81. *Id.*

addiction problems. Any absences due to inpatient treatment will often entail filing notices of unavailability in an attorney's active cases,⁸² and will require informing all clients of the unavailability.⁸³ Also, if the length of treatment will affect the requirement for expeditious litigation,⁸⁴ cases may be assigned to other attorneys in the firm. Solo practitioners may file requests for substitution of counsel and transfer their cases to outside counsel.⁸⁵ Explanation of the reasons for such a temporary retirement need not be made public.⁸⁶ The *Model Rules of Professional Conduct* require termination only in the case of material impairment of the ability to represent the client.⁸⁷ Out-patient treatment and continuing in practice will not create a conflict unless the materiality requirement is met.⁸⁸ An attorney should be entitled to no less privacy than an ordinary citizen, at least until the ability to practice is impaired.

Voluntary treatment carries with it the heavy burden of self discipline. The attorney should continue treatment as directed by his or her doctors and must have the wherewithal to return to treatment in case of a relapse. In-house counseling and support may not be available on a formal basis in most firms. However, candor with one's employers may elicit informal support, an allowance for needed time off, and most importantly, the respect and gratitude of the partnership for coming forth with the concerns before a manifestation by misconduct.

82. The notice of unavailability is a legal nullity, but is regularly filed as a matter of courtesy. Said notices are often taken into consideration in setting hearing and docket dates, but not always.

Requests to change the time or place of oral argument are disfavored . . . [c]ounsel normally are expected to reschedule their other obligations to eliminate any conflicts. Nevertheless, counsel faced with an irreconcilable conflict may request a change in the date or time of oral argument. But they must make a showing of *good cause* before the court will grant the requested change. [Circuit Rule 34-2]. Advance notice of unavailability: Counsel should apprise the court by letter *before the argument date* is set if a potential conflict (e.g., a prolonged absence from the country) is known.

CHRISTOPHER A. GOELZ & MEREDITH J. WATTS, CALIFORNIA PRACTICE GUIDE; FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE, Ch. 9. Oral Argument: 9-B. Setting Cases For Argument (d) [9:79–80].

83. Failure to do so would violate MODEL RULES OF PROF'L CONDUCT R. 1.4 (1983-2001).

84. MODEL RULES OF PROF'L CONDUCT R. 3.2 (Rev. 1984).

85. MODEL RULES OF PROF'L CONDUCT R. 1.16 (Rev. 1984).

86. Nowhere in the *Model Rules* is there a requirement that an attorney reveal personal matters to clients. Only when such personal matters may impair the ability of the attorney's duties towards clients do the *Model Rules* come into play. See *id.* at 1.16(a)(2).

87. *Id.*

88. *Id.*

2. Inactive Bar Status

An attorney may also apply to the Bar for placement on inactive status.⁸⁹ The Florida Bar provides that an attorney who has not been adjudicated incompetent, but who is incapable of practicing law because of physical or mental illness, may be classified as an inactive member.⁹⁰ Once so classified, the lawyer is required to refrain from the practice of law even though there have been no allegations of misconduct.⁹¹ Proceedings regarding inactive members are processed under the Rules of Discipline in the same manner as proceedings involving misconduct.⁹² Inactive members may be reinstated upon petition to and approval by the Board of Governors, and if such a petition is rejected, it is subject to review by the Supreme Court of Florida.⁹³

To take such a step is certainly more drastic than the voluntary treatment described above. First, it prevents the attorney from practicing and, in so doing, takes away his or her livelihood. The inability to earn a living may have serious consequences on the attorney's personal life, which may in turn exacerbate the very reasons he or she requested inactive status in the first place. Second, inactive status is a matter of public record.⁹⁴ The attorney will have exposed the most private of concerns to the world at large, and be subject to greater scrutiny from the bar and colleagues than in the case of voluntary treatment.⁹⁵ Finally, the attorney runs the risk of not being able to be reinstated.⁹⁶

89. R. Regulating Fla. Bar 3-7.13(a).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Attorney status is provided along with the attorney's name on the Florida Bar's website at <http://www.flabar.org/>.

95. Although the Florida Board of Bar Examiners asks bar applicants a series of questions relating to mental illness (*see* Coleman & Shellow, *supra* note 68), this author has found no requirement that practicing attorneys keep the Bar abreast of the status of their mental or physical health, as long as any problems remain below the materiality threshold in MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2). Even compliance with Rule 1.16(a)(2)—voluntary withdrawal from representation—has no reporting requirement. In the absence of a reporting requirement, an attorney's private concerns would remain private. There would be no scrutiny because no one would (or should) know that the attorney has sought treatment.

96. Reinstatement is by petition to and approval by the Board of Governors, subject to Supreme Court review. R. Regulating Fla. Bar 3-7.13.

B. Adjudication of Insanity or Mental Illness

Adjudication of insanity or mental illness will assure an attorney of inactive status.⁹⁷ Even in the absence of misconduct, the courts will suspend the license of an attorney found to be mentally incompetent. In *The Florida Bar v. Worthington*,⁹⁸ the court stated that Article II of the Florida Bar's Integration Rule⁹⁹ requires that "a lawyer who has been adjudged mentally incompetent shall be suspended from the practice of law . . . subject to any rights he may have to apply for reinstatement at the proper time and upon proper showing."¹⁰⁰

If the attorney waits until the illness or addiction manifests itself through misconduct, the costs might increase dramatically. Although mental illness may be considered a mitigating factor in the severity of the discipline meted out,¹⁰¹ the defense of NGRI (not guilty by reason of insanity) appears not to exist when applied to the rules of professional conduct. The various state bars appear to have applied the equivalent of a doctrine of strict liability regarding attorney compliance, especially regarding the handling of trust funds.¹⁰² Even innocent negligence resulting in no damage to any party may be grounds for suspension or disbarment.¹⁰³

The Supreme Court of Louisiana declared that "mental defects [which render] an [officer] of the [court] incapable of distinguishing between right

97. A lawyer who has been adjudicated insane or mentally incompetent under the Florida Mental Health Act shall be placed on an inactive list and shall refrain from the practice of law. R. Regulating Fla. Bar 3-7.13(b).

98. 276 So. 2d 39 (Fla. 1973).

99. FLA. STAT. § 32 (1999). Superseded. The superseding provisions to the Bylaws Under the Integration Rule of the Florida Bar may be found in Chapter 2, Bylaws of the Florida Bar of the Rules Regulating the Florida Bar.

100. *Worthington*, 276 So. 2d at 39–40.

101. For example, "disbarment may be excessive discipline when mitigating evidence of mental or substance abuse problems cast doubt upon the intentional nature of the attorney's misconduct." *Fla. Bar v. Condon*, 632 So. 2d 70, 72 (Fla. 1994). See generally Sarno, *supra* note 4, at 995.

102. "[M]isuse of trust account funds is one of the most serious offenses a lawyer can commit and disbarment is normally presumed to be the appropriate discipline." *Condon*, 632 So. 2d at 71.

103. Mark Sturman, a former attorney in North Miami, opted for a voluntary resignation of five years rather than face possibly greater discipline. Controls over his firm's trust account were weak. Although all parties were paid, and there was no hint of deliberate impropriety, some parties were paid later than they should have been, which precipitated the original complaint and the Bar's subsequent action. From a presentation by Mr. Sturman at Nova Southeastern University Shepard Broad Law Center in April, 2002.

and wrong [may] exempt him from criminal responsibility . . . or even . . . civil liability for a tort.”¹⁰⁴ However, such defects will not “exonerate a lawyer from the consequences of his professional misconduct.”¹⁰⁵ While it might “not be humane to punish by” incarceration a person unable to understand the wrongfulness of his acts, “it is quite another matter to permit such a person to continue as an officer of the court.”¹⁰⁶ Unlike the considerations of punishment or restitution in criminal or civil matters, the interest and safety of the public are of the utmost importance in disbarment proceedings.¹⁰⁷ The public has a right to protection from a lawyer who, regardless of the cause, exhibits a lack of integrity and common honesty.¹⁰⁸

A New Jersey court believed that the public also had a right to protection from attorneys who abused the potential promise of mitigated punishment for misconduct available to the mentally impaired.¹⁰⁹ The court expressed concern over the growing number of attorneys charged with misconduct who admitted themselves to hospitals for treatment of depression or anxiety, and then used the excuse of temporary mental disorder as the cause of their misconduct.¹¹⁰

C. Mitigation

Regardless of the form of mental disorder, any mitigation of discipline for misconduct will be contingent upon a showing of causation.¹¹¹ The attorney will be required to demonstrate to the satisfaction of the court that, but for the mental disorder, the attorney would not have engaged in the misconduct.¹¹² Further, an attorney must show that he or she is actively seeking treatment, or that he or she has been rehabilitated.¹¹³

104. La. State Bar Ass’n v. Theard, 62 So. 2d 501, 503 (La. 1952) (citations omitted).

105. *Id.*

106. *Id.*

107. *Id.* at 504.

108. *Id.*

109. *In re McManus*, 381 A.2d 352, 353 n.1 (N.J. 1978).

110. *Id.*

111. 7 N.Y. JUR. 2d *Attorneys at Law* § 405 (1997). On the other hand, in *Clement*, the Florida Bar disbarred an attorney where it was shown that his “misconduct was not a direct result of his bipolar disorder.” Fla. Bar v. Clement, 662 So. 2d 690, 700 (Fla. 1995).

112. *Clement*, 662 So. 2d at 700.

113. *See, e.g., In re Berkowitz*, 730 N.Y.S.2d 118, 121 (App. Div. 2001). Sanction of less than disbarment, given an attorney’s “expressed remorse, the absence of venal

Gregory G. Sarno, author of several articles dealing with mental illness and attorney discipline, divides his review of the relevant cases into five categories:¹¹⁴ alcoholism, drug dependence, neuroses, psychoses, and other disorders.¹¹⁵ Addiction to alcohol and other drug dependencies are often included in discussions of mental illness, in part because they are considered mental disorders in and of themselves, and also because they are often symptomatic of, or comorbid with, some other mental disorder.¹¹⁶

1. Alcoholism

It has generally been held that alcoholism is not an excuse for unethical behavior,¹¹⁷ but courts differ as to whether it should be considered a mitigating factor in discipline.¹¹⁸ The courts must weigh the public policy factors of a disapproval of alcohol addiction against the counterproductive effect on the goal of sobriety which a lengthy suspension would have on the affected attorney.¹¹⁹

Attorneys asserting alcoholism as a defense to charges of professional misconduct have been met with varying degrees of success.¹²⁰ Punishments have ranged from disbarment¹²¹ to reprimand,¹²² the severity predicated more on the nature of the misconduct than on its cause. For example, Thomas

intent . . . [and the] commencement of psychotherapy to combat his depression." *Id.* at 121; *In re Milloy*, 571 N.W.2d 39 (Minn. 1997).

[P]sychological disability will mitigate discipline if the attorney proves by clear and convincing evidence that five factors are met: (1) the attorney has a severe psychological problem; (2) the psychological problem was the cause of the misconduct; (3) the attorney is undergoing treatment and making progress; (4) the recovery has arrested the misconduct; and (5) the misconduct is not apt to recur.

Milloy, 571 N.W.2d at 46 (citing *In re Weyrich*, 339 N.W.2d 274, 279 (Minn. 1983)).

114. Sarno, *supra* note 4, § 1.

115. 46 AM. JUR. 2d *Proof of Facts* 563 (1986).

116. "Nearly all alcoholics have a comorbid psychiatric disorder, most commonly anxiety and mood disorders in women and drug abuse and antisocial personality disorders in men." Enoch and Goldman, *supra* note 54, at <http://www.aafp.org/afp/20020201/441.html>.

117. *Id.* See, e.g., *People ex. rel. Ill. State Bar Ass'n v. Tracey*, 145 N.E. 665, 666 (Ill. 1924).

118. Sarno, *supra* note 4, § 9(a); see, e.g., *In re Houtchens*, 555 S.W.2d 24 (Mo. 1977) (mitigation considered); *In re Laury*, 706 P.2d 935 (Or. 1985) (mitigation not considered).

119. See Sarno, *supra* note 4, § 2.

120. *Id.*

121. See, e.g., *Disciplinary Counsel v. Silva*, 633 P.2d 538 (Haw. 1981); *People v. Moore*, 561 P.2d 340 (Colo. 1977).

122. See, e.g., *La. State Bar Ass'n v. Mundy*, 423 So. 2d 1126 (La. 1982); *In re Johnson*, 322 N.W.2d 616 (Minn. 1982).

Larkin was suspended by the Florida Bar for failing to appear at the continuation of a trial, and for neglecting other legal matters, after it was shown that the misconduct was "totally from [the] effects of alcohol abuse."¹²³ His willingness to seek rehabilitation resulted in a suspension of ninety-one days and until such time as rehabilitation was established to the satisfaction of the Bar.¹²⁴ Similarly, Ray Hill¹²⁵ and William Blalock¹²⁶ were indefinitely suspended from practice until restitution was made for the fees collected from the clients who were affected by their misconduct as well as for the cost of the proceedings against them, and until they were able to convince the court of their rehabilitation.¹²⁷ In New Jersey, Mr. Gilliam's misappropriation of client funds was grounds for disbarment, given that his comprehension and will power were not sufficiently impaired by his alcohol addiction to excuse his misconduct.¹²⁸

2. Drug Dependence

Drug dependence as a defense to misconduct has been met with responses similar to those found in cases where alcoholism was asserted as a defense, except there are no reported cases of discipline being reduced to mere censure or reprimand.¹²⁹ There is no evidence to indicate if this is because drug-dependent attorneys commit more egregious ethical violations than their alcoholic counterparts, whether the courts have less sympathy for drug abuse than for alcohol abuse, or if the courts believe that rehabilitation from drug dependency is more arduous than recovery from alcohol dependency. In any event, the least severe punishment rendered against an attorney for misconduct linked to drug abuse was suspension for a definite time.¹³⁰ However, disbarment is not uncommon.¹³¹ Remorse, rehabilitation,

123. Fla. Bar v. Larkin, 420 So. 2d 1080, 1081 (Fla. 1982).

124. *Id.*

125. *In re Hill*, 298 So. 2d 161, 163 (Fla. 1974).

126. Fla. Bar v. Blalock, 325 So. 2d 401, 404 (Fla. 1976).

127. *Hill*, 298 So. 2d at 163.

128. *In re Gilliam*, 524 A.2d 810 (N.J. 1987).

129. Sarno, *supra* note 4, § 9.

130. *Id.*

131. Disbarment was the proper discipline for an attorney who was convicted for drug abuse, misappropriated client's funds, neglected his duties as executor of estate, and ignored orders of probate court and court hearing disciplinary matter. *Disciplinary Counsel v. Connaughton*, 665 N.E.2d 675, 675-76 (Ohio 1996); "Addiction to . . . drugs will not excuse conduct on the part of the attorney warranting disbarment." *In re Abney*, 447 S.E.2d 848, 850 (S.C. 1994); *In re Schlesinger*, 607 N.Y.S.2d 462 (App. Div. 1994) (disbarring attorney,

full restitution, and a willingness to help others recover from addiction will assist the attorney in mitigating punishment.¹³² Alan Larkin avoided the presumptive sanction of disbarment for misappropriation of client funds in this way.¹³³ The Supreme Court of Florida overruled the Florida Bar's request for disbarment and held that Larkin's misconduct was directly caused by his addiction.¹³⁴ It noted that his remorse, subsequent rehabilitation and his efforts to help others militated in his favor, and reduced the proposed punishment to a three-year suspension.¹³⁵

3. Anxiety and Dissociative Disorders

Neurosis is no longer considered a distinct category of mental disorder by the American Psychiatric Association¹³⁶ due to the absence of consensus regarding its meaning.¹³⁷ The classification has been replaced by several categories, including affective, anxiety, somatoform, dissociative, and psychosexual disorders.¹³⁸ However, in lay terms, "neurotics" can be

notwithstanding indication that attorney suffered from drug addiction, was "being treated by a physician and [was] willing to participate in . . . [bar association] program for lawyers").

132. See, e.g., *In re Berkowitz*, 730 N.Y.S.2d 118, 121 (App. Div. 2001); *In re Milloy*, 571 N.W.2d 39 (Minn. 1997).

133. *Larkin*, 420 So. 2d at 1081.

134. *Id.*

135. *Id.*

136. Sarno, *supra* note 4, § 2.

137. "Some clinicians limit the term to its descriptive meaning [as indicating a painful symptom in someone with intact reality testing] whereas others also include the concept of a specific etiological process," an unconscious conflict arousing anxiety, leading to maladaptive use of defense mechanisms, and resulting in symptom formation. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 9 (3d ed. 1980).

138. Sarno, *supra* note 4, § 2.

Mood disorders (affective disorders): A group of heterogeneous, typically recurrent illnesses including unipolar (depressive) and bipolar (manic-depressive) disorders that are characterized by pervasive mood disturbances, psychomotor dysfunction, and vegetative symptoms; [Anxiety disorders: Excessive, almost daily, anxiety and worry for greater than six months about a number of activities or events.] Somatoform disorders: A group of psychiatric disorders characterized by physical symptoms that suggest but are not fully explained by a physical disorder and that cause significant distress or interfere with social, occupational, or other functioning; Dissociative disorders: Failure to integrate one's memories, perceptions, identity, or consciousness normally; Psychosexual disorders include sexual dysfunctions, the most common form of psychosexual disorder seen by the practicing physician; gender identity disorders; and paraphilias.

distinguished from “psychotics” by their general ability to maintain insight and to be less affected in their day-to-day living.¹³⁹ Attorneys invoking one of the neuroses as a defense or a mitigating factor to their professional misconduct have been disbarred or suspended, sometimes indefinitely, sometimes until rehabilitated.¹⁴⁰ Probationary terms often accompany a suspension.¹⁴¹

4. Psychosis

A diagnosis of psychosis would at one time have been the death knell for an attorney’s career. Traditionally, the term psychosis has been used to denote mental disorders so severe that the affected individual is out of touch with reality.¹⁴² Psychoses are profound, sweeping mental disorders characterized by severe disturbances of perception, thought processes, feelings and behavior, and often include a retreat from, or perversion of, social relationships and a disintegration of the personality structure.¹⁴³ Fortunately, recent advances in psychiatric treatment and medication allow some psychotics to lead much improved lives, and the promise of more complete recoveries may be possible as research continues in this rapidly developing field.¹⁴⁴ Other than disbarment or suspension, further types of discipline for attorneys claiming psychosis as a mitigating factor in

THE MERCK MANUAL OF DIAGNOSIS AND THERAPY § 15, ch. 186–89, 192 (Mark H. Beers & Robert Berkow eds., 17th ed. 1999), available at <http://www.merck.com/pubs/mmanual/sections.htm> [hereinafter MERCK MANUAL].

139. *Id.*

140. *Id.*

141. *Id.*

142. Sarno, *supra* note 4, § 2.

143. *Id.*

144. During the 1990s there have been some dramatic advances in the treatment of schizophrenia. Just as the serotonin re-uptake inhibitor (SRI) class of antidepressants has largely replaced the older and more problematic tricyclic antidepressants (based in large part on safety and side-effect considerations), a shift in the treatment of schizophrenia is now taking place. Some quite recent studies indicate that newly available treatments for schizophrenia may offer substantial clinical advantages over the older standard antipsychotic (or “neuroleptic”) medications. In September 1996, the Food and Drug Administration (FDA) approved another new atypical antipsychotic, olanzapine, for use in schizophrenia, and quetiapine was approved in September 1997. Several additional atypicals are currently in large-scale clinical trials and/or pending FDA approval, including sertindole and ziprasidone. David Shore, M.D., Editor-in-Chief, *Recent Developments in Atypical Antipsychotic Medications*, Schizophrenia Bulletin, accessed at <http://mentalhealth.about.com/library/drugs/blatyp-d.htm>.

misconduct have included the ability to continue practicing subject to compliance with the recommendation of voluntary psychiatric aid and consultation for several years.¹⁴⁵

5. Other Disorders

Sarno's final category of mental disorder is labeled "Other Disorders," and includes "burn-out" and emotional distress brought on by trauma or by severe family or financial difficulties.¹⁴⁶ Suffering from intense emotional upheaval, precipitated by the dissolution of his marriage, saved Val Patarini from disbarment after he hired a "muscle man" to threaten his ex-spouse and inflict harm on his ex-spouse's counsel.¹⁴⁷ Although the court seriously considered disbarment, it found that the attorney's long, unblemished record combined with the severity of the distress caused by the divorce was sufficient to preclude a more serious punishment than the one-year suspension it imposed.¹⁴⁸

Actual misconduct or findings of misconduct are not always a prerequisite to suspension.¹⁴⁹ In 1973, the Florida Bar temporarily suspended M. C. Scofield for being intoxicated in open court, denying ever having seen clients who had given him a retainer, and pulling a pistol on clients.¹⁵⁰ The court stopped short of finding him guilty of specific acts of misconduct, perhaps as a kindness in view of his advanced age¹⁵¹ and perceived senility.¹⁵² In making its decision, the court relied on the Integration Rule,¹⁵³ which provides that an attorney not adjudicated incompetent or accused of misconduct shall be placed on the inactive list (suspended) when it is shown that he or she is incapable of practicing law.¹⁵⁴ If inability to practice is suspected by conduct unrelated to the practice of law, the court may order a psychiatric evaluation with an emphasis on determining the attorney's competence.¹⁵⁵ Failure to comply with a request

145. *Id.*

146. Sarno, *supra* note 4, § 7.

147. Fla. Bar v. Patarini, 548 So. 2d 1110, 1111 (Fla. 1989).

148. *Id.*

149. See Fla. Bar *re. Arthur*, 22 Fla. L. Weekly S551 (Sept. 4, 1997); Fla. Bar v. Hughes, 504 So. 2d 751 (Fla. 1987); Fla. Bar v. Scofield, 287 So. 2d 285 (Fla. 1973).

150. *Scofield*, 287 So. 2d at 285.

151. *Id.* at 287. He was admitted to the Florida Bar in 1916.

152. *Id.*

153. R. Regulating Fla. Bar, 11.02.

154. *Scofield*, 287 So. 2d at 286.

155. *Hughes*, 504 So. 2d at 751.

for such an evaluation will result in suspension until the evaluation is performed.¹⁵⁶ In *Florida Bar re Arthur*,¹⁵⁷ attorney's petition for her removal from suspension was denied while she still refused to comply with the evaluation request.¹⁵⁸

6. The Effect of the ADA in Attorney Misconduct Proceedings

Attempts by some attorneys to invoke the ADA¹⁵⁹ as precluding punishment for mental disorders have failed.¹⁶⁰ In *The Florida Bar v. Clement*,¹⁶¹ the court held that, although Clement's bipolar disorder was a disability under the ADA, the ADA did not prevent the court from sanctioning Clement for misconduct.¹⁶² Furthermore, the court found that the misconduct was not caused by Clement's disorder and that ADA protection was therefore not available.¹⁶³ The court went on to point out that, even if the disorder were the direct cause of Clement's misconduct, and given that Clement suffered from a recognized disability, he was not a "qualified" individual under the definition of the ADA.¹⁶⁴ The court held that Clement was not qualified to be an attorney "because he committed serious misconduct and reasonable accommodations were not possible."¹⁶⁵ Three years later, the Supreme Court of Ohio cited *Clement* in finding that the ADA does not preclude disbarment of an attorney with bipolar disorder for misappropriation of client funds.¹⁶⁶

Malpractice insurance is unlikely to protect the mentally disordered attorney from the pecuniary consequences of misconduct.¹⁶⁷ Misconduct

156. *Id.*

157. 22 Fla. L. Weekly at S551.

158. *Id.*

159. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12131 (2002).

160. The first of these cases was *In re Wolfram*, 7 Nat'l Disability Law Rep. (NDLR) 45, 149 (Cal. Bar Ct. Aug. 22, 1995). See also *State ex rel. Okla. Bar Ass'n v. Busch*, 919 P.2d 1114 (Okla. 1996); *Fla. Bar v. Clement*, 662 So. 2d 690 (Fla. 1995).

161. 662 So. 2d at 690.

162. *Id.* at 699-700.

163. *Id.* at 700.

164. *Id.* See 42 U.S.C. § 12131. The ADA requires that employers make "reasonable modification" for individuals who are otherwise qualified to perform the demands of a certain job (in the case of mental disorder, an employer may grant the employee permission to seek treatment during working hours). *Clement*, 662 So. 2d at 700.

165. *Clement*, 662 So. 2d at 700.

166. *Cincinnati Bar Ass'n v. Komarek*, 702 N.E.2d 62, 67 (Ohio 1998).

167. *Prasad v. Allstate Ins. Co.*, 644 So. 2d 992 (Fla. 1994). Intentional act exclusions are typical for all insurance policies, and professional liability insurance is no exception. *Id.*

caused by mental illness is generally viewed by insurance carriers even more narrowly than it is viewed by the Bar.¹⁶⁸ Any act which the attorney commits is considered intentional, and the concept of mens rea is inapplicable to the insurance adjuster's analysis.¹⁶⁹

IV. THE ATTORNEY'S FIRM

Mental disorders may have severe consequences for attorneys and clients, but the structure of the *Model Rules* and their progeny is such that

The Supreme Court of Florida held that the actions of the insane are not "accidents" and are thus not exempt from intentional act exclusions. *Id.*

[W]e hold that an injury inflicted by an insured who is psychotic is not an 'accident' and is an intentional act within the meaning of the policy provisions at issue if the insured intends to cause the injury even if the insured's conduct is the result of the insured's mental condition.

Id. at 992.

[A] second line of authority concludes that an injury inflicted by an insane person is intentional if the actor understands the physical nature and consequences of the act. This is true even if the actor is unable to distinguish right from wrong. This second line of authority is embraced by a number of other state supreme courts. *See Shelter Mut. Ins. Co. v. Williams*, 248 Kan. 17, 804 P.2d 1374 (Kan. 1991) (an injury inflicted by an insured who is mentally ill is intentional within the meaning of the policy provision excluding coverage for intentional acts of the insured if the insured understands the nature and quality of his acts and intends to cause the injury, even though the insured may have been unable to recognize his conduct as wrongful); . . . *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (Neb. 1993) (shooter who was found not guilty in criminal trial by reason of insanity still "intended" the results of his actions because he knew he was shooting a gun; however, if he thought he was peeling banana at the time he fired the gun, insanity might preclude application of intentional injury exclusion clause); *Johnson v. Ins. Co. of N. Am.*, 350 S.E.2d 616 (Va. 1986) (coverage of mentally ill insured who shot and injured friend was precluded by intentional injury exclusion clause where insured was aware of fact that he was shooting friend, but believed God ordered him to do so); *Municipal Mutual Ins. Co. v. Mangus*, 443 S.E.2d 455 (W.Va. 1994) (coverage under an intentional injury exclusion clause may be denied when the one who commits a criminal act has a minimal awareness of the nature of his or her act; the test for criminal insanity is appropriate only in a criminal trial and has no applicability to the interpretation of this issue). We agree with the latter line of authority because we find that a person who is considered insane may still be capable of entertaining the intent to commit certain acts, even if that intent is the consequence of a delusion or affliction. For instance, an insane or mentally ill person can still make plans to harm another, going so far as to obtain the weapon to be used and to seek out the victim. By any stretch of the imagination, the person "intended" the act against the victim, even if the person did not fully understand what he or she was doing at the time of the crime.

Id. at 994-95.

168. *See Prasad*, 644 So. 2d at 995.

169. *Id.*

the attorney's firm will not be immune from repercussions either. The following section discusses the far-reaching consequences of mental disorder and misconduct for the attorney's employers or partners.

Will the misconduct of the mentally disordered attorney give rise to liability on the part of his or her employer? The firm employing the mentally disordered has two duties in this regard. The *Rules of Professional Conduct* provide that law firms must have in place managerial controls reasonably designed to give "reasonable assurance that all lawyers in the firm conform to the Rules."¹⁷⁰ Secondly, a lawyer having knowledge that another lawyer has committed a violation of the rules which is to "a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects [is required to] inform the appropriate professional authority."¹⁷¹ In other words, law firms are responsible for catching, reporting, and correcting the misconduct of their associates and partners, and failure to do so may lead to sanctions against the partners.

The use of the word "reasonable" in Chapter Five of the *Model Rules* implies a recognition that no amount of office procedures could catch every instance of misconduct.¹⁷² A determined attorney could conceal misconduct for quite some time without giving rise to a Rule 5.1 violation on the part of the firm. There have, nevertheless, been limits to the court's willingness to interpret what is reasonable.¹⁷³ In a case cited three times for the same issue, Florida's Court of Appeal for the Fifth District held that "presumed access of a partner [in a law firm] to confidential information imputes knowledge of that information to others in [the] firm,"¹⁷⁴ implying that only deliberate efforts at concealment by the wrongdoer will excuse a firm's lack of knowledge and thus, shield it from liability.¹⁷⁵

170. MODEL RULES OF PROF'L CONDUCT R. 5.1 (a) (1983).

171. MODEL RULES OF PROF'L CONDUCT R. 8.3 (a) (1983).

172. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (Rev. 1984). "A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." *Id.*

173. *Sears, Roebuck & Co. v. Stansbury*, 374 So. 2d 1051 (Fla. 5th Dist. Ct. App. 1979).

174. *Id.* at 1053.

175. *Id.* Courts appear to be split on this issue. For example, Florida and Illinois impute knowledge to partners, but South Carolina requires actual knowledge. *See Sears, Roebuck & Co.*, 374 So. 2d at 1051. The Bankruptcy Court for the Northern District of Illinois, in *In re Georgou*, 145 B.R. 36 (Bankr. N.D.Ill. 1992), cited the Illinois Partnership Act as controlling the vicarious liability of partners in a law firm: §13, *Partnership Bound by Wrongful Partner's Act* states as follows:

A. *The Attorney's Duty to Mitigate*

The comments to Florida's Rule 4-5.1, modeled after the ABA's rule 5.1, state that "[t]he supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred."¹⁷⁶ The comments add that, "if a supervising lawyer knows that a subordinate [has] misrepresented a matter to an opposing party in negotiation, [both] the supervisor [and] the subordinate ha[ve] a duty to correct the resulting misunderstanding."¹⁷⁷ Thus, beyond the duty to report misconduct, which will be discussed below, it should be clear that supervisory attorneys and, by extension, law firms, have an affirmative duty to mitigate the damage to the client and to the judicial process as a whole.

In this author's opinion, there is also an additional duty found nowhere in the rules. It is a duty toward a coworker that is both professional and humanitarian. In the event a coworker exhibits signs of mental disorder, but has not yet committed misconduct, it should be incumbent upon the partners to recommend counseling and to assist to the extent possible. Such assistance may include reassigning the attorney's cases so as to put them out of reach of the potential for damage through misconduct. It may also include bar or firm sponsored rehabilitation programs, or simply mandating time off to seek treatment. No matter what form it may take, or however painful, early intervention is vastly preferable to the harm caused to all parties by preventable misconduct.

There are some nuances to the extent that liability will accrue to a law firm for the misconduct of one of its members. While the general rule is that

Where, by any wrongful act or omission of any partner acting in the ordinary course of business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefore to the same extent as the partner so acting or omitting to act.

Id. South Carolina emphasized the need for actual knowledge of wrongdoing in *In re Anonymous Member of South Carolina Bar*, 552 S.E.2d 10 (S.C. 2001). It cited Rule 5.1(c)(1) and (2) of the state's *Rules of Professional Conduct*. These sections provide:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.

176. FLA. RULES OF PROF'L CONDUCT R. 4-5.1 cmt. (1988).

177. *Id.*

a “firm is liable for the attorney/drafter’s misconduct to the same extent as he is,”¹⁷⁸ an agency relationship must exist between the attorney and the firm in order for the firm to incur liability.¹⁷⁹ Moreover, liability will not extend beyond the attorney if the attorney is “of counsel” and not held out as acting on behalf of the firm.¹⁸⁰ This holds true even if the attorney’s name is on the firm letterhead.¹⁸¹ Attempts by plaintiffs to extend “of counsel” liability to the firm on the theory of agency by estoppel have also failed.¹⁸² Recognizing generally accepted practices in partnership law, some courts have stated that firms may not be liable for the misconduct of attorneys acting outside of the scope of their authority.¹⁸³ In *David v. Schwarzwald, Robiner, Wolf, & Rock Co.*,¹⁸⁴ the Ohio Eighth District Court of Appeals held that the determination of the attorney’s scope of authority was a question for the finder of fact, and refused to hold the respondent law firm liable for the actions of its employee, pending further investigation.¹⁸⁵

B. Duty to Report Another Attorney’s Misconduct

While there is some latitude and interpretation permitted concerning the duty to prevent misconduct, there is none at all regarding its reporting once misconduct has been found. Cases such as *Himmel*¹⁸⁶ and *Skolnick v.*

178. *In re Klenk*, 612 N.Y.S.2d 220, 222 (App. Div. 1994) (citations omitted).

179. *Trimble-Weber v. Weber*, 695 N.E.2d 344, 347 (Ohio Ct. App. 1997). “The Code of Professional Responsibility does not define ‘of counsel,’ but does provide that ‘[a] lawyer may be designated ‘Of Counsel’ on a letterhead if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.’” *Id.* (citing DR 2-102(A)(4)).

180. *Id.*

181. *Id.*

182. *Id.* at 347–48.

183. In *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 385 (Fla. 4th Dist. Ct. App. 1999), the Fourth District Court of Appeal stated:

The law firm’s liability in this case turns on the plaintiffs’ ability to attribute [its employee’s] actions to the firm. An employer is responsible for the wrongful acts of its employee if the conduct of the employee is within the scope of his employment, which includes acts “of the kind he is employed to perform” and that conduct “occurs substantially within authorized time and space limits and . . . is activated at least in part by a purpose to serve the [employer].”

Id. See *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061, 1067 (Fla. 2d Dist. Ct. App. 1987); *Whetzel v. Metro. Life Ins. Co.*, 266 So. 2d 89, 91 (Fla. 4th Dist. Ct. App. 1972); *Gates v. Utsey*, 177 So. 2d 486, 488 (Fla. 1st Dist. Ct. App. 1965); see also *David v. Schwarzwald, Robiner, Wolf & Rock Co.*, 607 N.E.2d 1173 (Ohio Ct. App. 1992).

184. 607 N.E.2d 1173 (Ohio Ct. App. 1992).

185. *Id.* at 1183–84.

186. 533 N.E.2d 790 (Ill. 1988).

*Alzheimer & Gray*¹⁸⁷ are an indication of the gravity with which the courts regard the reporting of misconduct. The courts have consistently held that the requirement to report misconduct is absolute,¹⁸⁸ leaving attorneys to wander about in a minefield where reporting is required, but where the determination of what constitutes misconduct remains open for interpretation.

Comments to the *Model Rules of Professional Conduct* Rule 8.3 read as follows:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.¹⁸⁹

Generally speaking, the type of misconduct to be reported is no surprise: misappropriation of client funds, bribery, blatant violations of confidentiality, fraud, forgery of a client's signature, and so on.¹⁹⁰ Difficulties arise when the misconduct is not so clearly defined,¹⁹¹ where the reporting

187. 730 N.E.2d 4 (Ill. 2000).

188. "Ten states follow the Model Code of Professional Responsibility's formulation that requires reporting of all ethical violations including technical infractions. (Alabama, Colorado, Georgia, Hawaii, Iowa, Illinois, Louisiana, Nebraska, Ohio and Vermont). The majority of states including Texas, follow the Model Rules of Professional Conduct, which requires a substantial violation." Bruce A. Campbell, *To Squeal or Not to Squeal: A Thinking Lawyer's Guide to Reporting Lawyer Misconduct*, 1 FLA. COASTAL L.J. 265, 268 n.12 (1999) [hereinafter Campbell]; see also Skolnick, 730 N.E.2d at 14.

189. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. (2002).

190. Campbell, *supra* note 188, at 274.

191. For example, in *Attorney U v. The Mississippi Bar*, 678 So. 2d 963, 972 (Miss. 1996), the Supreme Court of Mississippi held that U did not have sufficient knowledge of S's misconduct to require him to report it. In so holding, the court stated:

[t]hat standard must be an objective one, however, not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred and that the conduct, if it did occur, raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law in other respects. *Id.*

Additionally, Bruce Campbell states:

attorney notices a pattern of incidents that as a group are reportable but individually are not,¹⁹² and particularly, where the reporting attorney must make a judgment call and knows he or she could be mistaken.¹⁹³ This is further exacerbated by the feeling that reporting is “squealing.”¹⁹⁴ To quote Campbell: “Few rules . . . stir more emotion and potential controversy than the ‘squealer’ or ‘snitch’ rule. . . . [t]he ‘schoolyard’ refrain of tattletale still rings . . . in our minds.”¹⁹⁵ Tattletale or not, failure to “squeal” can be costly. A Texas attorney was suspended for thirty-nine months for violating “rules regarding candor toward the tribunal [for failing] to report another lawyer’s misconduct.”¹⁹⁶

If one covers for a partner at a hearing once because the partner was still intoxicated from the previous night’s activities, does the intoxication raise a substantial question as to the partner’s fitness? If one covers for the partner a second, a third, or a fourth time? Who decides when conduct becomes reportable misconduct? An attorney confronted with such a situation may consult the state’s ethics committee for guidance,¹⁹⁷ but the final determination rests with the state’s highest court of appeal.¹⁹⁸ If the ethics committee and the court differ in an interpretation, the court prevails and the attorney may face sanctions despite his reliance on the ethics committee’s opinion.¹⁹⁹

See Nebraska Ethics Op. 89-4; “Because knowledge in the reporting rule means more than a suspicion, a lawyer need not report mere suspicions of code violations.” *Id.* New Mexico’s position is that the mandatory obligation to report occurs “when a lawyer has a substantial basis for believing a serious ethical violation has occurred, regardless of the source of that information.” New Mexico Ethics Op. 1988-8 (undated). The Committee on Professional Ethics of the Association of the Bar of the City of New York Bar states that a “reporting lawyer must be in possession of facts that clearly establish a violation of the disciplinary rules.” New York City Ethics, Op. 1990-3 (1990). The District of Columbia Bar Ass’n has concluded that a lawyer is compelled to report “only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts.” District of Columbia Bar, Op. 246 (Revised 1994).

Campbell, *supra* note 188, at 277.

192. See *Attorney U*, 678 So. 2d at 972.

193. *Id.*

194. Campbell, *supra* note 188, at 265.

195. *Id.*

196. Bruce A. Campbell & Ruth A. Kollman, *The Lady or the Tiger? Opening the Door to Lawyer Discipline Standards*, 1 Fla. Coastal L.J. 231, 248 (1999) (citing *Grievance Disciplinary Actions*, 61 Tex B.J. 281, 283 (1998)).

197. See, generally, Campbell, *supra* note 188; *Attorney U*, 678 So. 2d at 963.

198. *Id.*

199. *Id.*

C. Risks of Reporting

Reporting misconduct is a two-edged sword. Those who fail to report run afoul of the state's disciplinary authorities.²⁰⁰ Those who report run the risk of expulsion from the partnership, and with it, attendant loss of work, financial hardship, and dubious reputation as a whistleblower.²⁰¹ Although a fiduciary duty exists between partners in a law firm, such a duty "does not encompass a duty to remain partners."²⁰² Despite arguments that such an extension of a partner's duty is necessary to prevent retaliation against a partner who in good faith reports suspected misconduct, the court in *Bohatch* held that "[j]ust as a partner can be expelled . . . over disagreements about firm policy . . . a partner can be expelled for accusing another partner of [misconduct] without subjecting the partnership to tort damages."²⁰³ The court's majority understood the dissent's concern that "retaliation against a partner . . . virtually assures that others will not take these appropriate steps in the future,"²⁰⁴ but stated that a lawyer's "duties sometimes necessitate difficult decisions . . .," and that "[t]he fact that the ethical duty to report may create an irreparable schism between partners [does not] excuse the failure to report."²⁰⁵

A mentally disordered attorney may be in a difficult professional position, but failure to take action on his or her own behalf places partners in a more difficult position. The partners will likely agonize over decisions forced on them when the illness or addiction reaches the point where it impairs the ability to practice. The firm may, as mentioned above, suggest counseling or threaten expulsion, but once the illness manifests itself by misconduct, it will be forced to report him or her. The interpersonal difficulties that such action poses may well be fatal to the survival of the firm, especially in a small partnership where the principals share something more than just a professional relationship.

The partnership discussed in the opening anecdote chose to do nothing. It stood by, wringing its collective hands, as Pfenning's cases dissolved into a collection of nonactionable disputes, whose statutes of limitations had long since passed. There is plenty of blame to go around here. Although

200. The watershed case here is *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). See discussion of this and other issues related to "whistleblowing" in Campbell, *supra* note 188.

201. See *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998).

202. *Id.* at 546.

203. *Id.*

204. *Id.* at 547 (quoting Spector, J., dissenting).

205. *Bohatch*, 977 S.W.2d at 547.

Pfenning had ultimate responsibility for his conduct, illness or not, the inaction of his partners exacerbated an arguably correctible situation. Their inaction ruined them and, more importantly, ruined the cases of their clients and made a mockery of the judicial process.

V. CONCLUSION

Although the incidence of malpractice due to mental illness is statistically not high,²⁰⁶ such a revelation is of small comfort to those clients forever prevented from pursuing their claims because of unanticipated attorney misconduct. Of the three parties to an attorney's mental illness—the client, the attorney, and the law firm—the client is least able to protect him or herself, and the most likely to suffer damage in the professional setting.²⁰⁷

Measures in place to arrest lawyer misconduct before it has irremediable consequences are necessarily inadequate to guarantee complete security for clients. Nevertheless, clients should have some responsibility for their own cases. This responsibility should never be abdicated in the expectation that the attorney is some form of savior. Greater client vigilance in selecting, monitoring, and where necessary, abandoning an attorney may have prevented many unhappy endings and malpractice suits.

The second party in the trial is the attorney. The justice system will be well served if the disordered attorney is able to seek help or withdraw from practice before the consequences of misconduct damage reputations and lives. This is an impossible step for some attorneys, and is where the third party comes into play.

It is understood that attorneys have a duty to abide by the *Rules of Professional Conduct*, and to seek treatment or removal when they are unable to do so. It is also clear that no attorney works in utter isolation—even solo practitioners generally have family or friends. The attorney's employers or partners are the next line of defense, and they have a moral and ethical duty to protect the interests of *all* of their clients.²⁰⁸ They also have a duty to protect their mentally disordered colleague from further damage to self and to the profession.²⁰⁹

206. See discussion *infra* notes 18–19.

207. Other parties might include family, friends, spiritual advisors, medical personnel, personal creditors of the attorney, and whomever else the attorney's conduct affects in the normal course of living.

208. See *infra* part III.

209. *Id.*

Mental illness rarely gives rise to the same measure of compassion as physical illness or damage. A diagnosis of influenza or a broken leg in a partner elicits compassion; a diagnosis of paranoid schizophrenia may still elicit suspicion, fear, and flight. This must change for two reasons: moral and pragmatic. The moral question is deeply personal, but the pragmatic question points straight to the *Rules of Professional Responsibility*. Failure to address the existence of a mental disorder in a colleague leads to disaster for clients, for the attorney, and quite rightly, for the law firm. The spineless response of Pfenning's partners hurt them all.

Appropriate action by the law firm at the first substantial hint of a problem or misconduct may be painful, but the consequences of cowardice are so great that a de facto decision to do nothing is impossible to justify.